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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte GREGG LANCE LEHMBERG
and LESLIE JOHN HERZOG

Appeal 2009-1668
Application 10/648,618
Technology Center 1700

Decided:¹ March 10, 2009

Before EDWARD C. KIMLIN, TERRY J. OWENS, and
KAREN M. HASTINGS, *Administrative Patent Judges*.

KIMLIN, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1-18 and 21-22.

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the Decided Date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

We have jurisdiction under 35 U.S.C. § 6(b). Claim 1 is illustrative:

1. A beverage precursor comprising:
 - (a) an infusible or wafer soluble material selected from the group consisting of tea leaf, ground coffee, coffee or tea particulates, cocoa, herbs and a mixture thereof; and
 - (b) aroma compound additive

wherein the infusible or water soluble material is present at a level that is from about 0.5 to about 25.0% by weight less than a conventional amount used for about a six to about eight ounce serving and the aroma compound is an additive and not originating from the infusible or water soluble material present, the conventional amount being defined as 1.90-2.50 grams for tea leaf, 3.5-6.5 grams for ground coffee, 1.4-2.4 grams for coffee particulates, 0.30-0.90 grams for tea particulates, 1.0-2.5 grams for herb and 1.85-4.5 grams for cocoa.

The Examiner relies upon the following references in the rejection of the appealed claims (Ans. 3):

Johnson	4,076,847	Feb. 28, 1978
Stoeckli	4,496,596	Jan. 29, 1985
Soughan	5,932,260	Aug. 03, 1999
Pultinas	0001460 A1	Apr. 18, 1979
Pflaumer	0011324 A1	May 28, 1980
Trumbetas	0560609 A1	Aug. 15, 1993
Daniel (as translated)	DE 19919711	Nov. 16, 2000

Appellants' claimed invention is directed to a beverage precursor and the beverage composition comprising an aqueous solution of the precursor. The precursor comprises an infusible or water soluble material, such as ground coffee, and an aroma compound additive. The infusible or water soluble material is present at a level that is from about 0.5 to about 25.0% by

weight less than a conventional amount used for about a six to about eight ounce serving.

Appealed claims 1-3, 10-12, 21 and 22 stand rejected under 35 U.S.C. § 102(b) as being anticipated by EP '609. The appealed claims stand rejected 35 U.S.C. § 103(a) as follows:

- (a) claims 1-18, 21 and 22 over DE '711,
- (b) claims 1-3, 10-12, 21 and 22 over EP '609, Stoeckli,
EP '324, EP '460 or Soughan,
- (c) claims 1-18, 21 and 22 over Johnson.

We have thoroughly reviewed each of Appellants' arguments for patentability. However, we find that the Examiner's rejections are well founded and supported by the prior art evidence relied upon. Accordingly, we will sustain the Examiner's rejections for the reasons set forth in the Answer, and we add the following primarily for emphasis.

We consider first the § 102 rejection over EP '609. EP '609, like Appellants, discloses a precursor composition for preparing a beverage comprising coffee and an aroma compound, i.e., coffee oil. The Examiner cites Example 1 of the reference and provides a calculation which demonstrates that the exemplified beverage comprises soluble coffee at a level that is within the claimed range of being less than a conventional amount used for a 6-8 ounce serving (Ans. bridging 3-4). Appellants have not refuted the Examiner's calculation in any way, let alone in a manner which demonstrates that the Examiner's analysis is in error. Appellants simply make the unsupported argument that

[t]here is no teaching whatsoever in the '609 reference that even remotely suggests that less than conventional amounts of infusible or water soluble materials selected may be used

in combination with aroma compound additive that is carried to make a superior precursor or beverage as claimed in the present inventions.

(Br. 9, third para.). Appellants do not present any analysis that demonstrates that the reference Example 1 does not, in fact, use less than the conventional amounts of infusible or water soluble material, namely, coffee. Also, Appellants offer no comment on the reference disclosure that “[a]ll of the above samples gave a detectable improvement in the flavor and aroma of the hot coffee beverage” (EP’609, p. 4, ll. 55-56). We do not understand Appellants’ statement that “[t]he ‘609 reference is merely directed to a coffee flavor and coffee aroma source of micromilled coffee that can be used in coffee flavored food products like ice cream, candy, chewing gum and fillings” (Br. 9, third para.). Manifestly, Example 1 of EP ‘609 prepares hot coffee beverages.

Appellants assert that the claimed beverage composition “is superior in that when reduced levels of infusible or water soluble material are present in combination with aroma compound additive, the beverage is preferred by consumers when compared to conventional beverages made with infusible or water-soluble material at typical levels and in the absence of aroma compound additive” (Br. bridging 8-9). However, Appellants fail to cite any particular objective evidence of such superiority or preference by consumers which may indicate unexpected results associated with compositions within the broad scope of the appealed claims. Certainly, it is not within the province of this Board to independently ferret out evidence of record and interpret it in a light most favorable to Appellants. Furthermore, the Examiner provides a thorough analysis of the sole Example in Appellants’

Specification and sets forth valid criticisms of the limited probative value of the Example to the extent that it falls far short of outweighing the evidence of obviousness of record.² Significantly, Appellants have not rebutted the Examiner's analysis and, as noted by the Examiner, evidence of unexpected results is ineffective for rebutting a rejection under § 102.

Concerning the various § 103 rejections of the appealed claims, Appellants have not refuted the Examiner's factual determination that all of the applied references employ the concept of adding an aroma compound in combination with a soluble beverage substrate. To the extent the references do not expressly disclose the claimed amounts of infusible or water soluble material, we fully concur with the Examiner that it would have been obvious for one of ordinary skill in the art to formulate a beverage precursor and beverage compositions comprising the amounts of coffee, tea, etc. in accordance with the particular taste of the consumer. We agree with the Examiner that "it is expected that the flavor attributed to a reduction in water soluble material may be met by adding an aroma additive to such degree as to make up for any loss in flavor" (Ans. 9). We subscribe to the Examiner's position that "the particular amount of aroma agent to be added to a soluble or infusible tea or coffee is seen as nothing more than a matter of preference depending on the particular flavor desired and degree of flavoring" (*id.*).

It is well settled that where patentability is predicated upon a change in a condition of a prior art composition, such as a change in concentration or the like, the burden is on the Applicant to establish with objective evidence that the change is critical, i.e., it leads to a new, unexpected result. *In re Woodruff*, 919 F.2d 1575, 1578 (Fed. Cir. 1990); *In re Aller*, 220 F.2d

² We direct attention to the analysis set forth at pages 8-9 of Answer.

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454, 456 (CCPA 1955). In the present case, Appellants have proffered no objective evidence which establishes criticality for compositions within the broad scope of the appealed claims.

In conclusion, based on the foregoing and the reasons well stated by the Examiner, the Examiner's decision rejecting the appealed claims is affirmed.

AFFIRMED

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